Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-924

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,

Petitioners,

vs.

ARIZONA BOARD OF REGENTS,

Respondent.

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioners

January 19, 1979

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Petitioners, ASSOCIATED STUDENTS OF THE UNIVERSITY OF ARIZONA (ASUA) and JOHN KROMKO, respectfully pray that a writ of certiorari issue to review the Arizona Court of Appeals Division Two decision entered in this proceeding on February 7, 1978.

I.

RESPONDENT OFFERS NO COMPELLING STATE INTEREST TO JUSTIFY ITS INFRINGEMENT OF PETITIONER'S FUNDAMENTAL RIGHTS.

Petitioner Associated Students of the University of Arizona (ASUA), contends that the lower court's rufusal to allowing ASUA to litigate in the courts of Arizona violates its First Amendment right of associational access to the courts, United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971), and right to petition, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), and denies ASUA equal protection of the law, Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972).

Respondent justifies such an intrusion by explaining that the rule prohibiting unincorporated groups from

sueing or being sued protects those associations and its individual members from liability for the tortious or contractual obligations of the association.

The Regents' concern for limiting student liability rings hollow when considered in light of their long-standing opposition to and prevention of incorporation by ASUA. Furthermore, respondent fails to document this apprehension which is in fact contradicted by the experience of unincorporated associations, many identical in composition to ASUA, which have litigated in Federal and many state courts. E.g., Associated Stud. of U. of Cal. at Riverside v. Attorney Gen., 368 F. Supp. 11 (1973). Finally, respondents insinuation that an uninvolved University of Arizona student, who is an ASUA member only because he or she must be,

could be held responsible for an ASUA debt is simply wrong. Such an assertion confuses the law of partnership with the principles of agency which govern the present situation and which would impose liability only upon personal ratification of the act. Am Jur. 2. Assoc. and Clubs § 16.

A fundamental right may be denied only upon a showing that a "subordinating interest is compelling." First Natl. Bank of Boston v. Bellotti, 98 S. Ct. 1407 (1978). The Regents proffer an interest of doubtful validity to justify the subjugation of rights guaranteed ASUA by the First and Fourteenth Amendments. A writ of certiorari should issue to scrutinize the situation.

II.

A CLASS ACTION IS NEITHER APPROPRIATE NOR PRACTICAL.

Respondent contends that if an unincorporated association is constitutionally entitled to sue as a group, a class action is the appropriate vehicle.

Initially, it need be noted that an organization's right of access to the courts as articulated by NAACP v. Button, 371 U.S. 415 (1963) and progeny, makes no such condition. Secondly, ASUA, the organization, is a party to the contract underlying this litigation, and therefore should be allowed to vindicate itself as such.

Additionally, forcing ASUA's approximately 35,000 members to resort to class actions to litigate the organization's claims impractical. Recent Arizona decisions are consistent with the Federal trend in limiting this court of action. See, Reader v.

Magma-Superior Copper Company, 110 Ariz. 115, 515 P. 2d 860 (1973). Furthermore, ASUA is a political organization comprised of university students, and thus its membership is ever transient. Class actions would pose suffocating logistical as well as financial problems acompanied by constant bickering regarding representation of the class.

Clearly, forced reliance on class actions would be tantamount to no legal redress and as such, is not a viable alternative.

III.

AT ISSUE IS NOT ONLY THE INTERPRETATION OF A CONTRACT, BUT THE EXERCISE OF CONSTITUTIONALLY PROTECTED LIBERTIES.

Finally, the Respondent opposes the issuance of a writ of certiorari on the grounds that the trial court's interpretation of the contract should

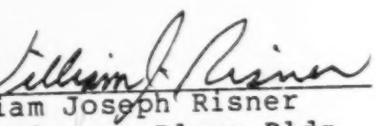
be deferred to by a reviewing tribunal. This argument ignores the practical implications of this petition. Indeed, ASUA attributes error to the interpretation of the contract by the lower courts, and realizes that this body has the perrogative of denying this writ, deciding this contract question, or remanding it for further consideration or factfinding.

However, this petition involves more than the determination of the present dispute. At issue is the right of ASUA or any unicorporated association to litigate in the Courts of Arizona. If the decision below is left standing, ASUA is left without any practical avenue for neutral arbitration of its affairs. In that case, the Regents could the next day declare the contract null and void, and leave ASUA without a state remedy, a course of

conduct not so preposterous in light of their present usurpation of the contract's profits.

Certainly, the instant litigation involves the interpretation of a contract, but more importantly, lies the right of an organization to enjoy its First Amendment rights of expression and petition, and its ability to enjoy and use its property as it sees fit. For these reasons a writ of certiorari is appropriate and should issue.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 1979, three copies of the Reply to the Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to the Hon.

Robert K. Corbin, Attorney General, 200 State Capitol Building, Phoenix, Arizona 85007, attn: David W. Ronald, Counsel for Respondent. I further certify that all parties required to be served have been served.

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